

9-1-1976

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Recommended Citation

Edward Veitch, *Punitive Awards in Canada -- A Neighbour's Experience*, 55 N.C. L. REV. 181 (1976).
Available at: <http://scholarship.law.unc.edu/nclr/vol55/iss1/8>

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PUNITIVE AWARDS IN CANADA— A NEIGHBOUR'S EXPERIENCE

EDWARD VEITCH†

In 1973 Professor Dobbs of the University of North Carolina School of Law published his treatise on the law of remedies.¹ It received immediate approval and adoption not only in the United States but also abroad. This writer adopted the Dobbs text for use in Canada not so much because of the lack of a local book but rather because of the writer's keen insight and solid common sense commentary. Consequently, in writing for this *Review* it is singularly appropriate, when professing the law of punitive damages of America's northern neighbour, to utilise the Dobbs format² to aid comparison of the practice of the two jurisdictions.

The two systems, in this field as in so many others, share a common source—the unreformed judicial opinions of the early English common law. Both jurisdictions have elaborated on those decisions³ and have developed detailed laws of punitive damages that differ from the now prevailing English law⁴ and from each other.

Those who believe that the function of civil law is purely compensatory have unleashed searching criticism of the remedy of punitive damages. Surprisingly, that criticism originates in England and the United States, not Canada. Nevertheless it has been traditional in Canada to explain damages for torts and for breach of contract as essentially compensatory with awards of punitive or exemplary damages.

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1. D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* (1973). It followed the excellent guide to the field by F. Lawson, *REMEDIES OF ENGLISH LAW* (1972) and has been joined by D. Walker's exhaustive work, *LAW OF CIVIL REMEDIES IN SCOTLAND* (1974).

2. D. DOBBS, *supra* note 1, at 204-21.

3. For the Canadian history and practice prior to 1970, see Fridman, *Punitive Damages in Tort*, 48 CAN. B. REV. 373 (1970). In view of the excellence of that survey this article deals essentially with post-1970 decisions.

4. Lord Devlin in *Rookes v. Barnard*, [1964] A.C. 1129, 1226-27, laid down the rule that punitive damages were limited to situations where: (i) the injury results from oppressive acts of government or its agents, (ii) the injury has been deliberately inflicted with a view to profit, or (iii) the award is authorized by statute.

being viewed as exceptional and almost irrational.⁵ Yet Canadian courts have granted punitive damages with almost gay abandon. It may well be, therefore, that the compensatory theory of tort law requires overhaul.⁶ More thoughtful writers have tended toward the explanation of the tort suit as one aimed at compensation and vengeance and the purpose of the monetary award as one of a *restitutio in integrum* coupled with a penalty.⁷

Whatever the jurisprudential dispute, all of the common law Provinces in Canada permit the award although there are disparities in the terminology employed and in the extent of the application of the award. For example, in British Columbia the courts tend to combine aggravated and punitive awards contrary to the practice in the other Provinces.⁸ On the other hand, until recently in Nova Scotia the judges adopted the restricted ambit of punitive damages described by the English House of Lords.⁹ In that Province it was held that the categories of cases in which exemplary damages should be awarded must be limited to (i) oppressive, arbitrary or unconstitutional action by the servants of Government, and (ii) conduct calculated by defendant to make a profit that may well exceed the compensation payable to plaintiff. Other categories of cases were to be dealt with by awards of aggravated, that is compensatory, damages. In the civil law Province of Quebec, although punitive damages are not awarded in theory,¹⁰

5. Damages in Canada are classified as follows: (i) *Special damages* comprise those damages that can be set out in detail in a plaintiff's claim and that are capable of calculation. These include doctors' fees, hospital bills and similar matters. (ii) *General damages* are the sums of money awarded that attempt, in so far as money can do so, to put the injured party in the same position as if he had not been injured. These include loss of future earnings, future expenses, loss of profits, pain and suffering, loss of amenities and loss of expectation of life. (iii) *Aggravated damages* may be awarded when the motives and conduct of defendant aggravate the injury to plaintiff. Money is given to compensate for insult, injured feelings and the like. (iv) *Punitive damages* are awarded to ensure that "tort does not pay." These damages are criminal, vindictive and exemplary in nature; they are designed to punish and teach lessons.

6. In *Broome v. Cassell & Co.*, [1971] 2 Q.B. 354, 382 (C.A.), Lord Denning correctly said of the House of Lords: "[They] thought that exemplary damages had no place in the civil code, and ought to be eliminated from it"

7. See Kelly, *The Inner Nature of the Tort Action*, 2 IR. JUR. (n.s.) 279 (1967). See also views of Professors James, Jolowicz, Weir and Linden cited in Veitch & Miers, *Assault on the Law of Tort*, 38 MOD. L. REV. 139, 142-43 (1975).

8. E.g., *Delta Hotels Ltd. v. Magrum*, [1976] 59 D.L.R.3d 126 (B.C. Sup. Ct. 1975); see Fridman, *supra* note 3, at 390.

9. *MacDonald v. Hees*, [1974] 46 D.L.R.3d 720 (N.S.); *Banks v. Campbell*, [1974] 45 D.L.R.3d 603 (N.S. 1973). These cases have now been overruled by the Nova Scotia Court of Appeal in *Atlantic Concrete Ltd. v. MacDonald Lavatte Constr. Co.*, [1976] 12 N.S.R.2d 179, 210-11.

10. See *Chaput v. Romain*, [1956] 1 D.L.R.2d 241 (Que. 1955).

in practice their purpose is achieved by the granting of *dommages moraux*—"moral damages"—in situations in which the majority of the common law jurisdictions would grant punitive damages.¹¹ That majority uses the award in a manner resembling American practice: awards are made in actions of tort such as assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution, false imprisonment, abuse of process, conspiracy and breach of fiduciary trust.¹²

In Canada punitive damages are readily and extensively used but not without some procedural problems of pleadings and of jury instructions. First, the pleadings. On occasion the courts have been asked to decide whether evidence relating to punitive damages can be presented when no averment was contained in the pleadings. If it is agreed that the objects of pleadings are—(a) to allow each side to know what case is being made out by the other, and (b) to assist the court in knowing what issues are to be tried—then it must be that such exceptional forms of awards must be expressly mentioned in the pleadings in order to avoid a trial by ambush.¹³ But if the function of the award is to permit the courts to mark out, of their own initiative, conduct that is unacceptable¹⁴ and so express their distaste for anti-social behaviour, then it follows that express pleading is unnecessary.

The courts have sometimes held that exemplary or punitive damages need not be claimed in the prayer for relief and may properly be awarded in answer to a claim for general damages.¹⁵ On other occasions judges have granted leave to amend the statement of claim to add such an item in mid-trial.¹⁶ Usually, however, punitive damages are expressly pleaded and proved;¹⁷ this practice is commendable because a defendant against whom such an award is likely should not be taken by surprise. By expressly pleading and proving punitive

11. Fridman, *supra* note 3, at 391.

12. The list derives in part from the opinion of Mr. Justice Schroeder in *Denison v. Fawcett*, [1958] 12 D.L.R.2d 537, 542 (Ont.).

13. Cf. the English dilemma in *Broome v. Cassell & Co.*, [1971] 1 All E.R. 262 (Q.B. 1970), *appeal dismissed*, [1971] 2 Q.B. 354 (C.A.), and [1972] A.C. 1027.

14. See *Canadian Ironworkers Local 1 v. International Bridge Ironworkers Local 97*, [1973] 31 D.L.R.3d 750, 753 (B.C. Sup. Ct. 1972).

15. See *Paragon Properties Ltd. v. Magna Envestments Ltd.*, [1972] 24 D.L.R.3d 156 (Alta.); *Holowaty v. Ford Motor Credit Co. of Canada*, [1974] 1 W.W.R. 225 (Alta. Dist. Ct. 1973).

16. E.g., *MacDonald v. Hees*, [1974] 46 D.L.R.3d 720, 731 (N.S.).

17. See *Can-Alta Carriers Ltd. v. Ford Motor Credit Co. of Canada*, [1975] 49 D.L.R.3d 319 (Alta. 1974); *Loomis v. Rohan*, [1974] 46 D.L.R.3d 423 (B.C.); *Roundall v. Brodie*, [1974] 7 N.B.2d 486 (Sup. Ct. 1972); *S. v. Mundy*, [1970] 9 D.L.R.3d 446 (Ont., Middlesex County Ct. 1969).

damages plaintiff can assist the court in performing its function of doing justice.

Jury instructions have also created problems. This is scarcely surprising in view of the absence in Canada of pattern instructions along the American model; Canadian "boilerplate" instructions, informally passed from judge to judge based on individual success before appellate courts, are an inadequate substitute. On the other hand, the problem is mitigated by the relative rarity, when compared with American practice, of jury trials in civil cases in Canada.¹⁸

The difficulty facing the Canadian trial judge is the choice between (a) instructing the jury to assess all compensatory (including aggravated) damages and then to assess punitive damages, or (b) directing the jury to assess only compensatory damages but, if it feels that that sum is inadequate, to assess an alternative amount in substitution for the original amount that is commensurate with defendant's wrongful conduct. The problem with the first lies in the likelihood of the jury "double counting"¹⁹ because aggravated damages include the insult suffered by plaintiff due to defendant's insolent disregard for plaintiff's legal rights. That is to say, jurors might forgiveably fail to distinguish between that harm and the need to express indignation in monetary terms in response to defendant's insolent disregard for the law. The dilemma is not hard to state: how can one draft instructions that will avoid the "double counting" and yet be comprehensible to the jury?²⁰ One recent laudable attempt appears in the case of *Eagle Motors (1958) Ltd. v. Makaoff*²¹ in which the learned judge charged the jury in these words:

Now, in addition to damages for the factors I have mentioned you may include in your award of damages an element for punitive damages. "Punitive" means a punishing element is present. You may include an amount for punitive or exemplary damages if, and only if, you find that the injury to the plaintiff has been aggravated by malice or by the manner of doing the injury; that is by the insolence or arrogance by which it is accompanied.

18. ONTARIO LAW COMM'N, ADMINISTRATION OF ONTARIO COURTS (1973), gives the following information at 331-35: Jury trials represent in Newfoundland and Labrador less than 10% of civil cases, 5% in Nova Scotia, 10% in British Columbia and Ontario, are "extremely rare" in New Brunswick, occur "almost never" in Prince Edward Island and Manitoba, and are "negligible" in Alberta and Saskatchewan. There are estimated to be about 50 jury cases per year in Quebec.

19. Stone, *Double Count and Double Trouble: The End of Exemplary Damages?*, 46 AUSTL. L.J. 311 (1972).

20. *Id.* at 318.

21. [1971] 17 D.L.R.3d 222 (B.C. 1970).

As to punitive or exemplary damages I warn you that awarding such is a weapon which should be used with a sense of proportion, a sense of moderation, a sense of restraint.²²

But even this advice caused the jury to over-estimate, at least in the eyes of the appellate court.²³

Because, as noted above, the great majority of cases are tried without a jury, it is of greater importance to consider judicial self-directions. The decisions reveal two main approaches. The most popular is to assess the special damages (proven and itemized losses to the date of the trial), then the general compensatory damages, then finally to add on an additional sum by way of punitive damages.²⁴ The second method is to make a global award. Under this second method, itemization of damages, if offered at all, is never more than perfunctory.²⁵ This latter approach has the "advantage" of rendering an appeal more difficult for defendant, but it also makes for difficulty in predicting the future attitudes of the court and in guessing what sizes of awards are possible for punitive damages. Because of these difficulties, the first direction is preferable, and is favoured by most courts. This first direction also roughly accords with the most frequently used jury instruction.

The procedural problems are explained to some extent by the ambiguities in the theories underpinning the award. If there is one generally accepted theory supporting the award in Canada it is that it is necessary to uphold civilized standards of behaviour. Thus in *Paragon Properties Ltd. v. Magna Envestments Ltd.*:²⁶

The basis of such an award is actionable injury to the plaintiff done in such a manner that it offends the ordinary standards of morality or decent conduct in the community in such marked degree that censure by way of damages is, in the opinion of the Court, warranted. The object is variously described to include deterrence to other possible wrongdoers, or punishment for maliciousness, or supra-compensatory recognition of unnecessary humiliation or other harm to which the claimant has been subjected by the censurable act. It is the reprehensible conduct of the wrongdoer which attracts the principle, not the legal category of the wrong out of

22. *Id.* at 224.

23. *Id.* at 226.

24. *See, e.g.*, *Gillett v. Nissen Volkswagen Ltd.*, [1976] 58 D.L.R.3d 104, 119 (Alta. 1975); *Guildford Indus. Ltd. v. Hankinson Management Servs. Ltd.*, [1974] 1 W.W.R. 141 (B.C. Sup. Ct. 1973).

25. *Delta Hotels Ltd. v. Magrum*, [1976] 59 D.L.R.3d 126 (B.C. Sup. Ct. 1975); *McKenzie v. Bank of Montreal*, [1975] 55 D.L.R.3d 641 (Ont. High Ct.).

26. [1972] 24 D.L.R.3d 156 (Alta.).

which compensatory damages arise and in relation to which the conduct occurred.²⁷

Accordingly, violent professional footballers²⁸ and irate golfers,²⁹ cynical finance houses³⁰ and reckless corporations,³¹ overzealous police³² and court officers,³³ malicious employers³⁴ and amoral trades unions³⁵ have been fined in damages for unacceptable conduct variously described as outrageous, high handed, wanton and arrogant.

The judges have often expressed their position to be that of ensuring that tort does not pay; this philosophy reaches cases in which there is no, or at least only minor, measurable harm to the plaintiff.³⁶ In such cases, the courts are determined to avoid the award of nominal damages, which "will have the effect of merely setting the license fee for the particular breach of the law,"³⁷ and to seek to persuade defendant against repetition. The consequence of this determination is to encourage members of society to vindicate their rights secure in the knowledge that the legal bills will be met by the punitive award; punitive damages often cover the cost of the participants' involvement in the pursuit of justice. Professor Linden has written of the function of tort law in Canada as that of an Ombudsman³⁸—the mirror concept of the American "private attorney general"—and there can be little doubt that punitive damages are the most persuasive example of this function of the law. The tort suit thus allows for application of pressure not only on the managers³⁹—"the distant, elite decision makers"

27. *Id.* at 167.

28. *Delta Hotels Ltd. v. Magrum*, [1976] 59 D.L.R.3d 126 (B.C. Sup. Ct. 1975).

29. *Roundall v. Brodie*, [1974] 7 N.B.2d 486 (Q.B. 1972). And irate fishermen are not immune. *Irving Pulp & Paper Co. v. McBrine*, [1975] 1 A.P.R. 194 (N.B.).

30. *Holowaty v. Ford Motor Credit Co. of Canada*, [1974] 1 W.W.R. 225 (Alta. Dist. Ct. 1973); *McKenzie v. Bank of Montreal*, [1975] 55 D.L.R.3d 641 (Ont. High Ct.).

31. *Dalsin v. T. Eaton Co. of Canada*, [1976] 63 D.L.R.3d 565 (Alta.); *H.L. Weiss Forwarding Ltd. v. Omnus*, [1975] 5 N.R. 511 (Can.).

32. *Bahner v. Marwest Hotel Co.*, [1970] 12 D.L.R.3d 646 (B.C.).

33. *Fraser v. Wilson*, [1969] 6 D.L.R.3d 531 (Man. Q.B.).

34. *Gillett v. Nissen Volkswagen Ltd.*, [1976] 58 D.L.R.3d 104 (Alta. 1975).

35. *Johnston Terminals & Storage Ltd. v. Miscellaneous Workers Local 351*, [1976] 1 W.W.R. 341 (B.C. Sup. Ct. 1975); *Canadian Ironworkers Local 1 v. Bridge Ironworkers Local 97*, [1973] 31 D.L.R.3d 750, 753 (B.C. Sup. Ct. 1972).

36. *E.g.*, *Johnston Terminals & Storage Ltd. v. Miscellaneous Workers Local 351*, [1976] 1 W.W.R. 341 (B.C. Sup. Ct. 1975).

37. *Pretv v. Donald Tilvey Co.*, [1966] 1 Ont. 191, 196 (1965).

38. Linden, *Tort Law as Ombudsman*, 51 CAN. B. REV. 155 (1973).

39. *See Wasson v. California Standard Oil Co.*, [1965] 47 D.L.R.2d 71 (Alta. 1964). In *H.L. Weiss Forwarding Ltd. v. Omnus*, [1975] 5 N.R. 511 (Can.) the Supreme Court of Canada imposed a punitive award to achieve substantial justice against a corporate giant when the two lower courts had declined to do so.

—but also on the police and other government administrators.⁴⁰ It has been convincingly argued that in Canada the tort suit is therefore the ally of both criminal law and administrative law. As Linden concluded:

The private tort suit is at the service of society as one way of rectifying some wrongs, or at least of exposing them to public view. Canadians would be wise to preserve the historic tort action as they may yet have need of it.⁴¹

If the purposes of punitive damages are to set standards and to check abuse of power, then should they be awarded only when there is evidence of a "bad" mind? Is it only when the defendant acts maliciously, wickedly, wantonly, indifferently, arrogantly or with insolence that he should be punished? The majority of Canadian decisions rely on the "bad" mind of the defendant to justify the award of punitive damages, and the few cases to the contrary are best explained as awards of aggravated (*i.e.*, compensatory) damages for injury to the plaintiff's dignitary interests.⁴² The insistence on the "bad" mind of the defendant logically leads to the consideration of mitigating factors for the remorseful wrongdoer. This factor was established relatively early⁴³ and has been maintained recently when a defendant, guilty of a drunken indecent assault, introduced evidence of his reformation and

40. See *Gershman v. Manitoba Vegetable Producers' Mkt. Bd.*, [1976] 2 W.W.R. 432 (Man. Q.B. 1975), *aff'd*, [1976] 4 W.W.R. 404 (Man. C.A.), in which it was said:

As the hearing progressed and the evidence disclosed more and more acts of vindictiveness by the board against plaintiff, I found it difficult to believe that this drama was acted out in 1974 in Manitoba and was not from the pages of medieval history. Never in all my 16 years of public life and 18 years on the bench have I come across a more flagrant abuse of power. There are many government-sanctioned boards in existence now having exclusive jurisdictions to administer many facets of the economic life of our country, and as our life becomes more interdependent we will have even more such boards. These governmental boards are established to administer exclusively the many different economic programs in our society. They are established with noble aims and for noble purposes. This most glaring abuse of power by the board, however, should not be allowed to pass without some assessment of punitive damages against it.

Id. at 443.

41. The court awarded \$35,000 punitive and general damages. Linden, *supra* note 38, at 168.

42. This explanation was expressly given in *Crowe v. Noon*, [1971] 1 Ont. 530 (1970), for false imprisonment courteously and apologetically done. *Fraser v. Wilson*, [1969] 6 D.L.R.3d 531 (Man. Q.B.) would appear to be a genuine exception. Punitive damages were awarded to a housewife against a bailiff for trespass while acting in the erroneous belief of the validity of his rights and powers. *Cf. Huckle v. Money*, 2 Wils. 206, 95 Eng. Rep. 968 (K.B. 1763).

43. *Slater v. Watts*, [1911] 16 B.C.R. 36, 43 (C.A.), *restated* in *Johnston Terminals & Storage Ltd. v. Miscellaneous Workers Local 351*, [1976] 1 W.W.R. 341 (B.C. Sup. Ct. 1975).

membership in Alcoholics Anonymous.⁴⁴ The emphasis on intentional wrongdoing suggests that in Canada, as in the United Kingdom,⁴⁵ punitive damages are unlikely to be awarded when the act complained of is merely negligent, *obiter dicta* to the contrary notwithstanding.⁴⁶ While it is true that contumelious disregard for the rights of others is the usual charge levelled against the private defendant, abuse of power is more often the complaint against the corporate defendant, the labor union or the government. Their violation of rights of plaintiff is treated in a manner that hints at a trend toward liability imposed on the privileged or economically superior when they mindlessly, rather than intentionally, throw their weight about to the detriment of others.⁴⁷ But it would be inaccurate to claim that there is as yet in tort law a development comparable to the burgeoning growth in contract law of the idea of inequality of bargaining power,⁴⁸ which relieves a consumer from the abuses of defendant's position of dominance. As tort law and punitive damages in particular appear to be moving toward that contractual development, so contract damages appear to be mimicking tort law's punitive award. Recent cases show a popularity for damages for "mental distress" in contract, which look very much like punitive damages in disguise, and which are granted when a superior party has acted in an unacceptable way in relation to a weaker party.⁴⁹ Although it has been accepted dogma from 1909⁵⁰ that punitive damages in contract are not permissible, in the last three years this prohibition may have been cautiously circumvented. So the reckless vacation operator,⁵¹ the too busy law firm⁵² and the callous employer⁵³ have

44. *S. v. Mundy*, [1970] 9 D.L.R.3d 446 (Ont., Middlesex County Ct. 1969).

45. *See Cassell v. Broome*, [1972] A.C. 1027, 1076, 1080, 1131.

46. *See Denison v. Fawcett*, [1958] 12 D.L.R.2d 537, 542 (Ont.).

47. *See Wasson v. California Standard Oil Co.*, [1965] 47 D.L.R.2d 71 (Alta. 1964); *Johnston Terminals & Storage Ltd. v. Miscellaneous Workers Local 351*, [1976] 1 W.W.R. 341 (B.C. Sup. Ct. 1975); *Guildford Indus. Ltd. v. Hankinson Management Servs. Ltd.*, [1974] 1 W.W.R. 141 (B.C. Sup. Ct. 1973); *Canadian Ironworkers Local 1 v. International Bridge Ironworkers Local 97*, [1973] 31 D.L.R.3d 750, 753 (B.C. Sup. Ct. 1972).

48. *Lloyds Bank Ltd. v. Bundy*, [1974] 3 All E.R. 757 (C.A.); *A. Schroeder Music Publishing Co. v. Macaulay*, [1974] 1 W.L.R. 1308 (H.L.); *see Clarke, Unequal Bargaining Power in the Law of Contract*, 49 AUSTR. L.J. 229 (1975). This line of reasoning has been followed in Canada in *McKenzie v. Bank of Montreal*, [1975] 55 D.L.R.3d 641 (Ont. High Ct.).

49. *See, e.g.*, cases cited notes 51-53 *infra*.

50. *See Addis v. Gramophone Co.*, [1909] A.C. 488.

51. *Jackson v. Horizon Holidays Ltd.*, [1975] 3 All E.R. 92 (C.A. 1974); *Jarvis v. Swans Tours Ltd.*, [1973] 1 All E.R. 71 (C.A.), *followed in Canada in Elder v. Koppe*, [1975] 53 D.L.R.3d 705 (N.S.). *Cf. Jarchow v. Transamerica Title Ins. Co.*, 48 Cal. App. 3d 917, 122 Cal. Rptr. 470 (4th Dist. 1975). The Business Practices Act, Ont.

been hit in the balance sheet for the intangible injuries caused by their thoughtless indifference to the interests of the ordinary individual. The judicial explanation of this phenomenon is that it is a simple extension of compensatory damages, but to the percipient it looks like the overlap between aggravated and punitive damages in tort. It may be that in Canada we are about to develop a full blown concept of liability of the superior based on the nature of that superior's behaviour in which the mental element or "bad" mind is considerably underplayed in assessing culpability.

While we are witnessing in these recent developments an assimilation, or re-assimilation,⁵⁴ of function between tort and contract, there still remain to be explained the peculiarities of awards of compensatory and punitive damages in libel, which stand out very much on their own. The obstacle in the way of a straightforward description stems from the differing purposes of the defamation action in the common law world other than the United States. The action is used for at least five purposes: (i) to vindicate a sullied name and to grant compensation for the infringement of a man's interest in his esteem with regard to his fellow men; (ii) to give a man monetary compensation for the grief, distress and insult he may suffer as a result of the defamation; (iii) to make recompense for the pecuniary loss after the manner of injurious falsehood and to prohibit unjust enrichment through the pirating of the characteristics of an individual that may have commercial value; (iv) to preserve public order, due to the demise of criminal libel, and to sustain the public's confidence in their institutions, whether they are local government authorities or public companies; and (v) to punish the publisher and printer of politically disruptive pamphlets and the scurrilous publisher for profit.⁵⁵

Individual damage awards may often seek to achieve more than one of these purposes. Consequently, they tend to defy uniform interpretation, especially when compensation and punishment are inextricably intertwined.⁵⁶ One recent Alberta decision⁵⁷ illustrates some of the

Stat., 1974, c. 131, § 4(2), permits an award of punitive damages for misrepresentation inducing a contract.

52. *Heywood v. Wellers*, [1976] 1 All E.R. 300 (C.A. 1975).

53. *Cox v. Philips Indus. Ltd.*, [1976] 1 W.L.R. 638 (Q.B. 1975); *Blackshaw, Damages for Demotion and Distress*, New L.J. 255 (1976).

54. See Professor Grant Gilmore's monograph, *THE DEATH OF CONTRACT* (1974), the origin of a continuing controversy.

55. Veitch, *Defamation Awards in Context*, 2 *ANGLO-AM. L.R.* 473, 474 (1973).

56. Awards have always been relatively large in comparison with prevailing levels of damages for purely physical harm. Cf. *Broome v. Cassell & Co.*, [1971] 2 Q.B. 354

properties of this composite action. Plaintiff's former employer provided information concerning plaintiff to a credit reporting agency that was gathering data on behalf of plaintiff's prospective employer. The former employer, motivated by malice, gave false information impugning plaintiff's honesty, with predictable results. The court assessed compensatory damages to include injury to feelings such as natural grief, distress and mental pain along with the anxiety attendant to plaintiff's search for alternative employment opportunities.⁵⁸ In addition, punitive damages were awarded not only to punish the deliberate and serious violation of plaintiff's rights but also to deter defendant from further similar misconduct.⁵⁹

While the libel awards are *sui generis* one can nevertheless divine in them the usual sort of rules that are followed by the Canadian courts in the award of punitive damages. These are: (i) there must be unacceptable misconduct insolently carried out; (ii) punitive awards are to be made irrespective of actual harm suffered; (iii) the award of compensatory damage need not limit the exemplary award; and (iv) the principal will usually be liable for the culpable acts of his agent or employee.

With regard to the first rule, no more need be said than that the insolence of defendant demands that damages be awarded to plaintiff for his insult and that punishment be extracted by the state for anti-social acts. The awards vary with the relative wickedness of defendant.⁶⁰

(C.A.), in which £15,000 compensatory and £25,000 punitive damages were awarded for libel in a war history. This is also true of the earlier years. In *Townshend v. Hughes*, 2 Mod. 150, 86 Eng. Rep. 994 (C.P. 1677), the sum of £4,000 (the equivalent of \$120,000 in 1976) was given for the libel that plaintiff was untrustworthy and a man who acted against the law and justice. Some two hundred fifty years later in 1935 an award of £5,000 (the equivalent of \$80,000 in 1976) was upheld by the House of Lords as a reasonable recompense for the allegation that plaintiff, a lawyer, had bolted the jurisdiction to avoid the law. *Ley v. Hamilton*, 153 L.T.R. (n.s.) 384 (H.L. 1935). In that same year Princess Alexandrovna Youssoupoff was awarded £25,000 (the equivalent of \$400,000 in 1976) against Metro-Goldwyn-Mayer for "the mental pain and suffering . . . undergone by a good and delicate woman who has been foully libelled in the presence of large numbers of people." *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, 50 T.L.R. 581, 586 (C.A. 1934).

57. *Gillett v. Nissen Volkswagen Ltd.*, [1976] 58 D.L.R.3d 104 (Alta. 1975).

58. *Id.* at 118.

59. *Id.* at 119. Contrast *Gillett* to the reverse practice in the United States, which is illustrated in the Massachusetts decision of *Stone v. Essex County Newspaper, Inc.*, — Mass. —, —, 330 N.E.2d 161, 169 (1975). The Massachusetts court reasserted in that case that awards in defamation suits are limited to actual damage, including mental suffering. Punitive damages are proscribed on the grounds that they would tempt juries to excessive and unbridled awards.

60. See *Turnbull v. Calgary Power Ltd.*, [1975] 51 D.L.R.3d 562, 567 (Alta.

In relation to the other rules, recent cases have underlined that punitive damages are awarded independently of actual injury on the premise that the purpose of the award is to mark out and deter conduct unbecoming a member of the community. Thus when a trade union carried out a vendetta against a corporation in breach of governing legislation, it was punished in damages even though the corporation was unable to show any kind of actual damage.⁶¹ Similarly, when a finance house overstepped the bounds of propriety in its repossession of a car, plaintiff was granted an award in spite of the absence of any measurable harm.⁶² Thus damages are sometimes awarded when compensatory damages are neither pleaded nor proved and are independently assessed in cases in which actual damage is alleged. There is no identifiable relation between compensatory and punitive damages when both are assessed and awarded in the same action. Sometimes the punitive award is greater,⁶³ sometimes equal to⁶⁴ and often less than the compensatory award.⁶⁵ What all of the cases do reveal is that punitive damages will be given whenever a cause of action, along with a bad motive, has been established; restricted application of the award has been rejected by all of the common law Provinces.⁶⁶

The measurement of the award is usually prescribed in part by defendant's reprehensible behaviour and in part by his wealth.⁶⁷ Sometimes, however, the courts will look only to the conduct of defendants in the assessment:

One is hard put to conceive of conduct more wilful, insolent and outrageous than that of the defendants. These are two big, heavy and well-conditioned professional football players. They have been trained to inflict and to take great physical punishment in a violent contact sport. Yet, without provocation and without

1974), in which the conduct of the trespassing defendant was found insufficiently censurable to warrant an award.

61. *Johnston Terminals & Storage Ltd. v. Miscellaneous Workers Local 351*, [1976] 1 W.W.R. 341 (B.C. Sup. Ct. 1975).

62. *Holowaty v. Ford Motor Credit Co. of Canada*, [1974] 1 W.W.R. 225 (Alta. Dist. Ct. 1973). *Accord*, *S. v. Mundy*, [1970] 9 D.L.R.3d 446, 450 (Ont., Middlesex County Ct. 1969).

63. *E.g.*, *Delta Hotels Ltd. v. Magrum*, [1976] 59 D.L.R.3d 126 (B.C. 1975); *Roundall v. Brodie*, [1974] 7 N.B.2d 486 (Q.B. 1972); *Broome v. Cassell & Co.*, [1971] 2 Q.B. 354 (C.A.).

64. *E.g.*, *Gillett v. Nissen Volkswagen Ltd.*, [1976] 58 D.L.R.3d 104 (Alta. 1975).

65. *E.g.*, *Guildford Indus. Ltd. v. Hankinson Management Servs. Ltd.*, [1974] 1 W.W.R. 141 (B.C. Sup. Ct. 1973).

66. The process of rejection of the English law is reviewed in *Turnbull v. Calgary Power Ltd.*, [1975] 51 D.L.R.3d 562, 567-76 (Alta. 1974).

67. *Hodgin & Veitch, Punitive Damages—Reassessed*, 21 INT'L & COMP. L.Q. 119, 132 (1972).

justification, they inflicted a savage beating on men who by far are not their physical equals and by means which would not be tolerated even in the arena of their professional activity.⁶⁸

Most cases rely on both the conduct and the means of the defendant in the assessment of the award.⁶⁹ The ultimate control on the mode of assessment rests with the appellate courts, which recently have been willing and ready to intervene not only to cut down awards but also to impose *de novo*⁷⁰ punitive damages. This willingness to interfere is explained in part by the relative rarity of jury trials in Canada, although, of course, juries are not immune from review.⁷¹ The Canadian awards have not yet reached United States proportions⁷² and as yet there have been no examples of outrageously excessive awards.⁷³

As mentioned above the sizes of awards are often determined by the wealth of the defendant. Frequently defendant is the employer of the actual wrongdoer because it is usual in Canada for the employer to stand vicariously responsible for the intentional wrongful acts of his employees. In recent years houses of entertainment have paid out on behalf of their boisterous private security guards,⁷⁴ finance corporations for their "heavies,"⁷⁵ trade unions for their local officers,⁷⁶ banks for their overly enthusiastic managers⁷⁷ and local government authorities for their policemen.⁷⁸ The justifications for this vicarious responsi-

68. *Delta Hotels Ltd. v. Magrum*, [1976] 59 D.L.R.3d 126, 130 (B.C. Sup. Ct. 1975).

69. *Compare Johnston Terminals & Storage v. Miscellaneous Workers Local 351*, [1976] 1 W.W.R. 341 (B.C. Sup. Ct. 1975) (rich), with *Borza v. Banner*, [1976] 60 D.L.R.3d 304, 311 (B.C., Nanaimo County Ct. 1975) (poor).

70. *E.g.*, *H.L. Weiss Forwarding Ltd. v. Omnis*, [1975] 5 N.R. 511 (Can.).

71. *Eagle Motors (1958) Ltd. v. Makao*, [1971] 17 D.L.R.3d 222 (B.C. 1970).

72. *Conley & Bishop, Punitive Damages and the General Liability Insurance Policy*, 25 FED'N INS. COUNSEL Q. 309 (1975), lists awards of \$17,250,000 and \$10,000,000; *DuBois, Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, [1976] INS. COUNSEL Q. 344.

73. The highest awards in recent years are \$30,000 in *Canadian Ironworkers Local 1 v. International Bridge Ironworkers Local 97*, [1973] 31 D.L.R.3d (B.C. Sup. Ct. 1972), and \$10,000 in *Guildford Indus. Ltd. v. Hankinson Management Servs. Ltd.*, [1974] 1 W.W.R. 141 (B.C. Sup. Ct. 1973).

74. *Bahner v. Marwest Hotel*, [1970] 12 D.L.R.3d 646 (B.C.); *Lakatos v. Ross & Victoria Hotel Ltd.*, [1974] 3 W.W.R. 56 (Man. Q.B.); *Perry v. Fried*, [1973] 32 D.L.R.3d 589 (N.S. 1972).

75. *Holowaty v. Ford Motor Credit Co. of Canada*, [1974] 1 W.W.R. 225 (Alta. Dist. Ct. 1973); *Eagle Motors (1958) Ltd. v. Makao*, [1971] 17 D.L.R.3d 222 (B.C. 1970).

76. *Canadian Ironworkers Local 1 v. International Bridge Ironworkers Local 97*, [1973] 31 D.L.R.3d 750 (B.C. Sup. Ct. 1972).

77. *McKenzie v. Bank of Montreal*, [1975] 55 D.L.R.3d 41 (Ont. High Ct.).

78. *See Cowe v. Noon*, [1971] 1 Ont. 530.

bility are not exceptional. There can be little doubt that the courts are persuaded by the necessity of finding a financially solvent party, although this is never expressly articulated. More often the courts rely on the rationale of the need to teach employers to be more careful and effective in their selection and supervision of their employees.⁷⁹

Of the group of employers listed above, government is probably the most difficult to fix with liability. Indeed in one case the court admitted its inability to provide a remedy because of governmental immunity but went on to suggest respectfully that an *ex gratia* payment might be made to the aggrieved plaintiff.⁸⁰ The Canadian judge felt constrained to paraphrase the words of Justice Robert Jackson of the United States: "The final protection against the invasion of individual liberty by members of officialdom is the attitude of society and its political forces rather than its legal machinery."⁸¹ But tort law and punitive damages do have a role to play in the control of government that has been recognized by other courts in Canada.⁸² It is noteworthy that the English House of Lords, while ostensibly wishing to remove punitive awards from the civil process, expressly retained a category of exemplary damages for abuse of power by government officers.⁸³ In an increasingly socialized and ordered society, administrative and governmental officers must be shown by the courts a code of basic acceptable conduct. Of course, the consequence may be sometimes to punish the whole community, by judgment distribution, but if the community is so apathetic as to force individual court action then that cost may be justified.

The vicarious liability of employers for the wrongful acts of their employees is linked with the question of the respective liabilities of tortfeasors for punitive awards. In the leading English decision of *Broome v. Cassell & Co.*⁸⁴ it was observed that the law was settled and that the court should assess one sum of damages against all defendants even

79. Hodgin & Veitch, *supra* note 67, at 128.

80. Cowe v. Noon, [1971] 1 Ont. 530, 540.

81. *Id.*

82. Linden, *supra* note 38, cites several cases illustrating how tort law can place restraints on government: *Beim v. Goyer*, [1966] 57 D.L.R.2d 253 (Can.) (injury caused by policeman); *Priestman v. Colangelo*, [1959] 19 D.L.R.2d 1 (Can.) (injury caused by policeman); *Ostash v. Sonnenberg*, [1968] 67 D.L.R.2d 311 (Alta.) (negligent inspector of gas furnace); *Windsor Motors Ltd. v. District of Powell River*, [1969] 4 D.L.R.3d 155 (B.C.) (negligent municipal license inspector). The English decisions of *Dutton v. Bognor Regis United Bldg. Co.*, [1972] 1 All E.R. 462 (1971) (C.A.), and *Ministry of Housing v. Sharp*, [1970] 2 Q.B. 223 (C.A.), likewise hold the government to account.

83. See note 4 *supra*.

84. [1971] 2 Q.B. 354 (C.A.).

though the conduct of one might be more reprehensible than that of his co-defendants. Clearly, however, it is contrary to principle to hold defendants equally liable in the absence of proof of equal guilt. This logic has persuaded the courts of Canada. Consequently, when there is evidence of a disparity of guilt among defendants, awards will reflect this,⁸⁵ but in the absence of such evidence equality of guilt is presumed.⁸⁶ The plea in mitigation of acting under orders of others may on occasion attract judicial sympathy but it neither negates nor earns any reduction in liability.⁸⁷

The liability of employers also inevitably raises the question of insurance against punitive awards. To this there is no Canadian response. While American courts have treated the matter either as a question of contractual construction or of public policy, north of the border the law reports are silent. There are some old English authorities to the effect that it is contrary to public policy to insure against criminal libel awards,⁸⁸ and in Canada there have been lengthy discussions of the wrongfulness of insurance coverage for illegal tortious behaviour⁸⁹ and intentional tortious conduct.⁹⁰ Yet the legislative response has been that certain criminal conduct—drunken driving in breach of the Criminal Code of Canada—is socially forgivable to the extent

85. See *Gillett v. Nissen Volkswagen Ltd.*, [1976] 58 D.L.R.3d 104 (Alta. 1975).

86. *Johnston Terminals & Storage Ltd. v. Miscellaneous Workers Local 351*, [1976] 1 W.W.R. 341 (B.C. Sup. Ct. 1975).

87. *Holowaty v. Ford Motor Credit Co. of Canada*, [1974] 1 W.W.R. 225 (Alta. Dist. Ct. 1973).

88. *Burrows v. Rhodes*, [1899] 1 Q.B. 816; *Shakell v. Rosier*, 132 Eng. Rep. 245 (C.P. 1836).

89. See, e.g., *O'Hearn v. Yorkshire Ins. Co.*, [1921] 67 D.L.R. 735 (Ont.). Cf. *Northwestern Nat'l Cas. Co. v. McNulty*, 307 F.2d 432, 441-42 (5th Cir. 1962), cited by Conley & Bishop, *supra* note 72, in which the court said:

Considering the theory of punitive damages as punitive and as a deterrent and accepting as common knowledge the fact that death and injury by automobile is a problem far from solved by traffic regulations and criminal prosecutions, it appears to us that there are especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of personal punishment in punitive damages when they are guilty of reckless slaughter or maiming on the highway To make that [public] policy useful and effective the delinquent driver must not be allowed to receive a windfall at the expense of the purchasers of insurance, transferring his responsibility for punitive damages to the very people—the driving public—to whom he is a menace. We are sympathetic with the innocent victim here; perhaps there is no such thing as money damages making him whole. But his interest in receiving non-compensatory damages is small compared with the public interest in lessening the toll of injury and death on the highways; and there is such a thing as a state policy to punish and deter by making the wrongdoer pay.

90. See, e.g., Veitch, *Criminality Insured: Law and Judicial Policy in Canada*, [1976] INS. COUNSEL J. — (forthcoming).

of permitting insurance coverage for damage illegally caused.⁹¹ This policy is clearly justified by the prior demands of the physically injured, but it does not support a policy of "anything goes," as recent cases have shown. In general the Canadian policy position is that:

Unless the contract otherwise provides, a contravention of any criminal or other law in force in Ontario or elsewhere does not, *ipso facto*, render unenforceable a claim for indemnity under a contract of insurance except where the contravention is committed by the insured, or by another person with the consent of the insured, with intent to bring about loss or damage but in the case of a contract of life insurance this section applies only to disability insurance undertaken as part of the contract.⁹²

But it must be that that provision will be strictly construed against the wrongdoer as decisions prior to the most recent amendments to the legislation showed.⁹³ Thus, while the trend to compensation is well advanced and to drink and drive is understandable, if not totally forgivable, in the eyes of the Legislature, there are still cases in which the courts have felt it proper to deny insurance coverage for liabilities incurred for harm intentionally inflicted.⁹⁴ It would be strange indeed if the Supreme Court of Canada were to deny coverage for compensatory liabilities but permit coverage for punitive awards arising from the same fact pattern.

From the description above it is apparent that punitive damages are awarded without reservation in most Canadian courts. Neither

91. The decision in *O'Hearn v. Yorkshire Ins. Co.*, [1921] 67 D.L.R. (Ont.), was legislatively overruled, on its facts, by the Insurance Amendment Acts 1972, c. 66, § 8, which deprived insurers of the use of a contractual exclusion of liability based on drunken driving of a vehicle by an insured. The permissible exclusions are now:

PROHIBITED USE BY INSURED

2.—(1) The insured shall not drive or operate the automobile,

- (a) unless he is for the time being either authorized by law or qualified to drive or operate the automobile; or
- (b) while his licence to drive or operate an automobile is suspended or while his right to obtain a licence is suspended or while he is prohibited under order of any court from driving or operating an automobile; or
- (c) while he is under the age of sixteen years or under such other age as is prescribed by the law of the province in which he resides at the time this contract is made as being the minimum age at which a licence or permit to drive an automobile may be issued to him; or
- (d) for any illicit or prohibited trade or transportation; or
- (e) in any race or speed test.

92. REV. STAT. OF ONT. c. 224, § 92 (1970). See Note, 31 CAN. B. REV. 319 (1953).

93. *Redding v. Thibodeau*, [1976] 13 N.S.R.2d 654; *Stats v. Mutual of Omaha Ins. Co.*, [1975] 6 Ont. 2d 734. See note 91 *supra* for the legislative reform.

94. *E.g.*, *Sirois v. Saindon & Co-op Fire & Cas. Co.*, [1975] 4 N.R. 343 (Can.).

the judges nor the academic commentators⁹⁵ have been prepared to debate, along the English lines,⁹⁶ whether there ought to be powers in the civil courts to punish defendants. Only in the Province of Nova Scotia was there any support for limiting the scope and function of the award.⁹⁷ Meanwhile the majority predilection for the unrestricted use of the remedy has the support of the highest courts of the other industrial Commonwealth jurisdictions.⁹⁸

The points made by the critics of the award in the United States—that it provides a windfall to plaintiff and is given without proof of loss, that it overlaps with the criminal law and creates a risk of double jeopardy and that its deterrent role is unproven—have to some extent been forestalled by the practice of Canadian judges.

First, the windfall accusation loses its effect when the award is viewed either as a disgorging of profits wrongfully made in the manner of unjust enrichment⁹⁹ or as an encouragement and reward for acting in the public interest to the litigant.¹⁰⁰ This use of punitive damages assumes an increasing significance today when only the very poor and the very rich can afford to go to court.

Second, the Canadian courts have dealt with the fact of overlap between the punitive damage award and the criminal process without any real misgivings. When defendant has been punished by the criminal law for the crime, he is not penalized again in damages.¹⁰¹ Nevertheless, where defendant has pleaded guilty to the crime charged and has been given an absolute discharge under the Criminal Code of Canada, some judges are of the opinion that this is not prior punishment as would necessarily preclude a punitive award.¹⁰² And again when defendant has pleaded guilty to a related but different act from that

95. See Fridman, *supra* note 3, and by implication Linden, *supra* note 38.

96. See *Rookes v. Barnard*, [1964] A.C. 1129; *Cassell & Co. v. Broome*, [1972] A.C. 1027, 1134, in which Lord Kilbrandon said: "I do not suppose that anyone now sitting to draft a civil code would include an article providing for punitive damages."

97. *MacDonald v. Hees*, [1974] 46 D.L.R.3d 720 (N.S.); *Banks v. Campbell*, [1974] 45 D.L.R.3d 603 (N.S. 1973).

98. *Australian Consol. Press Ltd. v. Uren*, 117 COMMW. L.R. 185 (Austl. 1968); *Fogg v. McKnight*, [1968] N.Z.L.R. 330.

99. *Johnston Terminal & Storage Ltd. v. Miscellaneous Workers Local 351*, [1976] 1 W.W.R. 341 (B.C. Sup. Ct. 1975); *Canadian Ironworkers Local 1 v. International Bridge Ironworkers Local 97*, [1973] 31 D.L.R.3d 750 (B.C. Sup. Ct. 1972).

100. *S. v. Mundy*, [1970] 9 D.L.R.3d 446 (Ont., Middlesex County Ct. 1969).

101. See *Loomis v. Rohan*, [1974] 46 D.L.R.3d 423 (B.C.), following *Natonson v. Lexier*, [1939] 4 D.L.R. 756 (Sask. K.B.); *Radovskis v. Tomm*, [1957] 9 D.L.R.2d 751 (Man. Q.B.).

102. See *Banks v. Campbell*, [1974] 45 D.L.R.3d 603 (N.S. 1973).

complained of in the civil trial, additional damages have been awarded.¹⁰³ The position seems to be that punitive damages will only be awarded when no actual criminal punishment has been meted out.

In conclusion, a review of the case law suggests that the Canadian law of punitive damages is quite distinctive; it was derived from the English law but has followed a different path. The sturdiness of this independence suggests that punitive damages may develop beyond their current scope and so complement criminal law and administrative law in setting minimal standards of behaviour and in pursuing social justice. There are not, as yet, vociferous critics in Canada of the award and indeed what writing there is on the subject is supportive of it.¹⁰⁴ The peripheral problems and wrinkles in the operation of the remedy have been pragmatically dealt with by the judiciary so that its potential growth appears assured.

103. *Borza v. Banner*, [1976] 60 D.L.R.3d 304 (B.C., Nanaimo County Ct. 1975). Defendant pleaded guilty to discharging a firearm in a public place but was civilly punished for so maliciously shooting invalid plaintiff's watch dog.

104. The limitations of the award are recognized in: Burns, *The Law and Privacy: The Canadian Experience*, 54 CAN. B. REV. 1, 15-16 (1976); Martin, *Civil Remedies Available to Residential Tenants in Ontario: The Case for Assertive Action*, 14 OSGOOD HALL L.J. 65, 82-86 (1976).

